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Nos. 80-11 and 80-15

In the Supreme Court of the United States

October Term 1980

J. GREGORY MERRION, *ET. AL.*,
Petitioners,

v.

JICARILLA APACHE TRIBE, *ET. AL.*,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE TENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF AMICI CURIAE

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Shell Oil Company, Chevron U.S.A., Inc., The Superior Oil Company, The Union Oil Company of California, Wilshire Oil Company of Texas, Anadarko Production Company and Texaco, Inc., respectfully move for leave to file a brief *amicus curiae* in these cases. The consent of the attorneys for the petitioners has been obtained. The consent of the attorneys for the respondents was requested but refused.

The interest of these movants in this case arises from the fact that they are parties to similar cases pending in the Court of Appeals for the Tenth Circuit. *Southland Royalty Company et al. v. Navajo Tribe of Indians, et al.*, Nos. 80-2035, 80-2036, 80-2037, 80-2038 and 80-2767 (10th Cir., docketed Oct. 2, 1980.) In the *Southland* cases these movants challenge the validity of two taxes imposed by the Navajo Tribal Council upon the value of movants' oil and gas leaseholds and their receipts from production on portions of the Navajo Reservation in Utah. In the *Southland* cases, movants place before the Tenth Circuit several of the issues before this Court in the present case. The common issues are: (1) whether Indian tribes may constitutionally tax production of oil and gas by non-Indians, in the absence of congressional approval; (2) whether such tribal taxation is lawful where it is not imposed as a condition of entering on Indian lands in leases approved by the Secretary of the Interior; (3) whether 25 U.S.C. §398c prohibits tribal taxation of oil and gas production on Executive Order reservations; (4) whether federal regulatory control over oil and gas production preempts tribal taxation of such production; (5) whether constitutional standards of due process and equal protection limit any tribal power of taxation over non-Indians; and (6) whether concurrent state and tribal taxation of oil and gas production unlawfully burdens interstate commerce.

In the present case before the Court of Appeals, petitioners did not address the issue whether Congress has preempted independent tribal taxation by regulat-

ing, in a comprehensive fashion, oil and gas leasing and production on tribal lands. The Court of Appeals nevertheless concluded that a tribe duly organized under the Indian Reorganization Act, 25 U.S.C. §§476 and 477, may lawfully regulate—and therefore tax—oil and gas leases on tribal lands, pursuant to 25 U.S.C. §396b. *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537, 548-49 (10th Cir. 1980). Implicit in the decision of the Court of Appeals is the conclusion that tribes (like the Navajo Tribe) that are not organized under pertinent acts of Congress may be preempted by comprehensive regulation. In their petition to this Court, the petitioners have indicated that they intend to *combine* their arguments relating (1) to exclusive state taxation of oil and gas production on Executive Order reservations and (2) to federal preemption of oil and gas leasing operations on tribal lands.

These movants believe that the question of exclusive state taxing jurisdiction and the question of federal preemption are separate and should be developed separately. If petitioners approach the issues in this Court as they did in the Court of Appeals, the federal preemption question will receive little attention in their briefs. For these reasons, movants believe that the brief they seek leave to file will address the preemption issue more completely than will petitioners. If movants' arguments on this question should be accepted by the Court, this case would thereby be decided in its entirety.

The Navajo Reservation, on which these movants conduct oil and gas operations, covers some 14.5 million

acres of land in Utah, Arizona and New Mexico. It is thus nearly twenty times larger than the Jicarilla Apache Reservation, which covers 750,000 acres in New Mexico. The volume of oil, gas and mineral production from the Navajo Reservation is proportionately greater than production from the lands of the Jicarilla Apache Tribe. For example, in 1975 the Navajo Reservation yielded more than 10 million barrels of oil, while the Jicarilla Apache Reservation yielded less than 412,000 barrels of oil. (Sources: Navajo Nation Office of Minerals Development and U.S. Geological Survey.) Thus, the consequences of tribal taxation will not be isolated to the lands of the Jicarilla Apache Tribe. The Court's decision in these cases will have enormous economic impact upon the many producers of energy, including movants, on the Navajo Reservation and upon the millions of persons who use that energy. Moreover, since all oil and gas sold from movants' leases on the Navajo Reservation is sold in interstate commerce, the consequences of tribal taxation will not be limited to the environs of the JicarillaApache Reservation or the Navajo Reservation, but will be national in scope.

To the extent that this Court's decision should hinge in whole or part upon the economic and commercial consequenes of unfettered tribal taxation movants believe that their brief will broaden the Court's understanding of those consequences.

Respectfully submitted,

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November 17, 1980

Nos. 80-11 and 80-15

In the Supreme Court of the United States

October Term 1980

J. GREGORY MERRION, *ET AL.*,
Petitioners,

v.

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Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF AMICI CURIAE

Shell Oil Company, Chevron U.S.A., Inc., The Superior Oil Company, The Union Oil Company of California ,Wilshire Oil Company of Texas, Anadarko Production Company, and Texaco, Inc., respectfully submit this brief as amici curiae in support of the position of petitioners in these cases.

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INTEREST OF AMICI CURIAE

Shell Oil Company, Chevron U.S.A., Inc., Texaco, Inc., The Superior Oil Company, The Union Oil Company of California, Wilshire Oil Company of Texas and Anadarko Production Company are producers of oil and gas from portions of the Navajo Indian Reservation situated in the southern part of Utah. The oil and gas leases from the Navajo Tribe under which these amici operate on that reservation were approved by the Secretary of the Interior. The leases provide for the payment of bonuses, rents and royalties to the Tribe, all of which amici have paid — in some instances for more than 25 years — for the right to extract oil and gas from tribal lands. In 1978, the Navajo Tribal Council legislated a "Business Activity Tax" and a "Possessory Interest Tax," both under color of its asserted sovereignty to govern non-Indians doing business on the reservation. The Navajo taxes are directed primarily at non-Indian producers of oil, gas, coal, uranium and electric power, all of whom conduct their business under pre-existing leases or other instruments approved by the Secretary of the Interior.

The decision of the Court of Appeals in these cases unmistakably suggests that the Navajo Tribe may ignore its lease covenants and may tax oil and gas production on the reservation without restraint. Our interest in these cases stems from a desire to continue production on the Navajo Reservation under the terms and conditions approved by the Secretary. If the Court of Appeals was right, and if tribes like the Navajo may tax producers unfettered by their leases or the Constitution, then

multi-million dollar investments made by these amici will be of doubtful value.

The problems generated by tribal taxation of oil and gas producers are not isolated to the Jicarilla Apache Reservation or the Navajo Reservation. These problems are national in scope for two reasons. First, Indian tribes in many parts of the nation own lands rich with natural resources. The Crows, the Blackfeet, the Osage, the Shoshone, the Arapahoe the Utes, the Sioux, the Hopi, the Laguna, the Papago and many other tribes in the West lay claim to vast reserves of valuable minerals. Each of these tribes has either promulgated taxes on producers or is encouraged to do so by the decision of the Court of Appeals.

Second, the oil, gas and other minerals produced from these reservations are usually sold and used in interstate markets. In fact, all of the oil and gas produced and sold by these amici from the Navajo Reservation is sold in interstate commerce. The Navajo Tribal Council characterizes the Navajo Nation as "a principal supplier of crucial energy resources critical to the development of the United States economy."[1] As well it might: between 1968 and 1975 Navajo tribal lands yielded more than 100 million barrels of oil, more than 64 million tons of coal, and more than 105 million cubic feet of natural gas. Amici already pay state taxes on their production of these resources and on property entailed in production. The addition of tribal taxes on

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[1] "Navajo Energy Policy", adopted by the Navajo Tribal Council as Resolution CAP-34-80 (April 29, 1980).

their property and production places amici at a distinct commercial disadvantage with respect to competitors who produce oil and gas from non-tribal lands. Tribal taxation discourages the massive investment necessary to finance sophisticated, enhanced recovery of hard-to-reach oil reserves; in the long run tribal taxes will prevent the development of resources that otherwise would be sold to consumers nationwide.

SUMMARY OF ARGUMENT

Federal regulation of oil and gas leasing and operations on restricted Indian lands is, as Congress intended it to be, comprehensive. Any attempt by a tribe of Indians to tax tribal leases or production from tribal lands interferes with the federal regulatory scheme. Just as the states are preempted from intruding upon areas regulated pervasively by the United States, so the tribes are proscribed from exercising their sovereign powers in a manner inconsistent with national interests implicit in federal statutes. Tribal taxation necessarily conflicts with the national interests (1) in uniform regulation of oil and gas production from tribal lands and (2) in the continued viability of the program of tribal leasing mandated by Congress. Pertinent federal statutes cannot be read to authorize a delegation to tribes of the power to tax oil and gas lessees.

Tribal taxation of oil and gas production impermissibly burdens interstate commerce. Assessed only against oil and gas sold or transported off the reservation, tribal taxes unlawfully provide a direct commercial advantage

to the tribe and its members. Concurrent tribal and state taxes on production from the reservation result in an unapportioned multiplication of taxes by independent sovereigns, in violation of the Commerce Clause of the Constitution.

ARGUMENT

I. *FEDERAL REGULATION OF OIL AND GAS LEASING AND PRODUCTION ON TRIBAL LANDS PREEMPTS TRIBAL TAXATION*

The petitioners in these cases assert that Congress has preempted tribal taxation of oil and gas production on Executive Order Indian reservations by (1) granting to the States the power to tax such production in 25 U.S.C. §398c and (2) granting to the Secretary of the Interior comprehensive authority to regulate tribal leasing of oil and gas properties and the production from such properties.[2] Amici believe that the issue of federal preemption is independent of this Court's construction of 25 U.S.C. §398c. That is, regardless whether section 398c is construed to constitute an exclusive grant of taxing power to the States, the pervasive character of federal regulation over tribal leasing and production preempts tribal taxation.

A. *Federal Regulation of Oil and Gas Leasing and Operations is Comprehensive*

The power of the United States to regulate com-

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[2] See **Petition For Writ of Certiorari of J. Gregory Merrion, Robert L. Bayless et al. (July 1, 1980) at 17-21.**

merce with Indian tribes derives from Article I, Section 8, Clause 3 of the Constitution. *White Mountain Apache Tribe v. Bracker*, 100 S.Ct. 2578, 2583 (1980). The power of Congress so conferred is exclusive and plenary. *Perrin v. United States*, 232 U.S. 478, 483 (1914); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903). With this constitutional authority, Congress has charged the Secretary of the Interior with the duty to approve all leases of any restricted Indian lands, whether tribally or individually owned; all such leases must be made "under such terms and regulations as may be prescribed by the Secretary of the Interior." 25 U.S.C. §415. In 1938, Congress enacted the Indian Mineral Leasing Act, 52 Stat. 347 (codified at 25 U.S.C. §396a-396g) in order to "obtain uniformity so far as practicable of the law relating to the leasing of tribal lands for mining purposes." H. R. Rep. 1872, 75th Cong., 3d Sess. (March 3, 1938). In that Act, Congress directed the Secretary to promulgate rules and regulations covering "[a]ll operations under any oil, gas, or other mineral lease issued pursuant to the terms of any act affecting restricted Indian lands." 25 U.S.C. §396d. Mineral leases of tribal lands, according to the Act are to be made only with the approval of the Secretary, *id.* §396a, and the Secretary may in his discretion reject any bid for such leases.[3] *Id.* §396b. The Act was intended to be the "comprehensive law covering mineral leases on unallotted land." *F.S. Cohen, Handbook of Federal Indian Law* 328 (G.P.O. ed. 1940).

[3] Note, however, that section 2 of the Act, 25 U.S.C. §396b, enables tribes organized under the Indian Reorganization Act, 25 U.S.C. §§476 & 477, to lease lands for mining purposes in accordance with federally approved tribal constitutions.

Pursuant to Congress's broad directive, the Secretary has promulgated a comprehensive array of regulations to cover virtually every aspect of the acquisition of oil, gas and mineral leases from tribes, the terms of such leases, the timing of payments under such leases, operations cancellation and assignment of such leases, safety, disposal of waste products restoration of surface mining sites, unitization and cooperative development of leased properties, and mining and processing methods. The Secretary's regulations codified in Parts 171 through 177 of Title 25 of the Code of Federal Regulations cover the leasing of tribally-held lands for oil, gas and mining purposes (Part 171), the leasing of allotted lands for such purposes (Part 172), mineral leasing of lands on specified reservations (Parts 173-176), and surface exploration, mining and reclamation of tribal lands (Part 177). In addition, the United States Geological Survey has, at the direction of the Secretary, promulgated operating regulations for the exploration, development and production of coal and other minerals on tribal lands in Parts 211 and 231 of Title 30 of the Code of Federal Regulations. Those regulations, which by their terms apply to both tribal and allotted Indian lands (*see* 30 CFR §§211.1(a) and 231.1(a)), cover operating plans, mapping, testing, maximum recovery amounts, safety, mining methodology, milling and record-keeping, and reclamation, among other matters.

In particular detail, the Secretary's regulations prescribe the per acre rent and percentage royalty to be included in the terms of oil and gas leases covering restricted tribal lands. (25 CFR §171.13) Higher

rates of royalty may be paid to the tribal lessor only if "fixed by the Secretary of the Interior or his authorized representative proir to the advertisement of land for oil and gas leases." (*Id.* §171.15) The regulations also prescribe the methods by which the value of hydrocarbons may be ascertained for computation of royalties (*id.* §171.13), and the manner and time for making rental and royalty payments. (*Id.* §§171.12 and 171.16) The same regulations require advance Interior Department approval of any operations under such leases (*id.* §171.20), reserve the right of the Secretary to restrict operations (*id.* §171.21), and require Secretarial approval of assignment and cancellation of leases. (*Id.* §§171.26 and 171.27)

The regulations in Part 171 serve two obvious purposes that reflect Congress's manifest intent in passing the Indian Mineral Leasing Act of 1938. First, the regulations create a uniform scheme for the acquisition and development of "[a]ll operations under any oil, gas or other mineral lease issued pursuant to the terms of any act affecting restricted Indian lands." 25 U.S.C. §396d. Second, the regulations discharge the trust responsibility of the United States to the tribes, by subjecting leases to the scrutiny of the Secretary's designee, by requiring detailed financial information from applicants, and by fixing fair terms of compensation to the tribes.

The Secretary's regulations also carefully protect the rights of private lessees. The regulations provide that lessees may not be "held liable for loss or destruc-

tion of . . . oil . . . by causes beyond the lessee's control." (*Id.* §171.13) They provide that gas produced from leases may only be used by the tribal lessor if the lessee's requirements for development and operation of the leases have been met. (*Id.*) Most significantly, the regulations prohibit any escalation in the percentage royalty to the tribal lessor after advertisement of the lease for bid. (*Id.*) Elsewhere the regulations prohibit the application of any new regulations, after Secretarial approval of the lease, that would "operate to affect the term of the lease, rate of royalty, rental, or acreage unless agreed to by both parties to the lease." (*Id.* §171.28) In protecting the lessees of tribal lands from unconsented changes in the tribe's remuneration, the Secretary's regulations ensure the continued viability of operations under tribal leases. If the tribes are free unilaterally to increase their share of the proceeds from oil and gas operations, Secretary-approved leases mean nothing, and the lessees' incentive to continue investing and operating is removed.

B. *Federal Regulation of Oil and Gas Operations on Tribal Lands Preempts Tribal Taxation of the Leases and Production of Lessees.*

The decisions of this Court on the limits of state and tribal authority lead directly to the conclusion that no sovereign—whether a state or a tribe—subordinate to the United States may lawfully regulate an area of commerce so prevasively regulated by Congress as the leasing and production of minerals on Indian lands. Just as the states are preempted from intruding upon the regulatory authority of the United States, so the tribes

are divested of the power to regulate in a manner "inconsistent with the overriding interests of the National Government." *Washington v. Confederated Tribes of the Colville Indian Reservation*, 100 S.Ct. 2069, 2081 (1980). The interests of the national government implicit in the Indian Mineral Leasing Act of 1938 and in the Secretary's regulations are plainly inconsistent with the tribes' attempts to tax private lessees.

1. *Federal preemption of tribal commerce*

In *Warren Trading Post Co. v. Arizona State Tax Commission*, 380 U.S. 685 (1965), the Court addressed the question whether Congress's delegation of authority to the Commissioner of Indian Affairs to regulate trading on the reservations preempted state taxation of traders. The Court reviewed the Commissioner's "detailed regulations" concerning traders and concluded:

> "These apparently all-inclusive regulations and the statutes authorizing them would seem in themselves sufficient to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders."

380 U.S. at 690. The Court held:

> "Indian traders trading on a reservation with reservation Indians are immune from a state tax like Arizona's . . . because Congress in the exercise of its power granted in Art. 1, Section 8, has undertaken to regulate reservation trading in such a comprehensive way that there is no room for the States to legislate on the subject."

Id. at 691 n.18.

In *White Mountain Apache Tribe v. Bracker, supra,* this Court's most extended discussion of federal preemption in tribal matters, two Arizona motor vehicles taxes were struck down because, it was held, the taxes were preempted by federal law. 100 S.Ct. at 2581. At the outset of its decision, the Court cautioned that the scope of federal preemption in this unique area is "not dependent on mechanical or absolute conceptions of State or tribal sovereignty, but has called for a particularized inquiry into the nature of the State, Federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *Id.* at 2584. With that principle before it, the Court observed that federal regulation of the harvesting of Indian timber is "comprehensive." *Id.* Those regulations, together with federal regulations governing roads developed by the Bureau of Indian Affairs, convinced the Court that "the federal regulatory scheme is so pervasive as to preclude the additional burdens sought to be imposed" by Arizona. *Id.* at 2586.

Certainly *White Mountain Apache* and *Warren Trading Post* dealt with federal preemption of *state* authority, and not tribal authority. The question that these cases pose in the present context is whether pervasive federal regulation of tribal commerce — specifically the leasing and resource development of tribal lands — overrides tribal taxation of non-Indian lessees. In short do these same preemptive restrictions against state action also limit tribal action? And if so, are tribal taxes

preempted by federal regulations of mineral leasing and operations on tribal lands?

2. *Divestiture of tribal sovereignty*

The Court has held on many occasions that tribal sovereignty must yield to the overriding interests of the United States. For example, in *United States v. Wheeler*, 435 U.S. 313 (1978), the Court held that the Fifth Amendment's double jeopardy clause does not bar a tribal member's prosecution in federal court, notwithstanding a previous conviction in the Navajo tribal court arising from the same incident. Acknowledging that the Navajos possess a "right of internal self-government," *Wheeler* nevertheless concluded: "Their incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised. By specific treaty provision they yielded up other sovereign powers; by statute, in the exercise of its plenary control, Congress has removed still others." 435 U.S. at 323.

In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), the Court held that Indian tribes lack jurisdiction to try non-Indians for criminal offenses in the absence of an affirmative grant of power by congressional statute or treaty. As the basis for its decision, the Court relied upon the proposition that tribes are proscribed from exercising "power inconsistent with their status" as dependents of the United States. 435 U.S. at 208. In particular, the Court observed:

> "Upon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty."

Id. at 209.

This Court's most recent discussion of the boundary between permissible tribal action and the "overriding sovereignty" of the United States, *Washington v. Confederated Tribes of the Colville Indian Reservation*, 100 S.Ct. 2069 (1980), considered whether tribes with constitutions approved by the Secretary of the Interior have the power to tax cigarette sales to non-Indians occurring on tribal trust lands. Acknowledging the rules set forth in *Wheeler* and *Oliphant, supra,* the Court stated:

> "The power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status.
>
> * * *
>
> *"This Court has found such a divestiture in cases where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government . . ."*

100 S.Ct. 2080-81 (emphasis added). Since the Court could find in the facts before it "no overriding federal interest that would necessarily be frustrated by tribal taxation," the Court upheld the taxes. The Court, how-

ever, emphasized that "tribal sovereignty is dependent on and subordinate to . . . the Federal government." *Id.*

The instant case presents precisely those facts, absent from *Colville,* which argue most forcefully for "divestiture" of tribal sovereignty. In this case, the tribe has asserted its taxing jurisdiction in an area that is comprehensively regulated by the federal government. In *Colville*, by contrast, federal regulation of tribal commerce in cigarettes was inconsequential.[4] The federal interest, if any, in regulating cigarette sales to non-Indians on the reservation sales was miniscule. In the present case, the federal interest in regulating development and production of oil, gas and other minerals on tribal lands is indeed significant — so significant that Congress has committed the task to the Secretary of the Interior and he, in turn, has promulgated a sweeping set of regulations that governs virtually very aspect of the area. Whether the Court characterizes this case as a "preemption" case in the mold of *Warren Trading Post* and *White Mountain Apache, supra,* or as a "divestitute" case like *Oliphant, supra,* the result must be the same: where, as with oil and gas development of tribal lands, the federal government has taken the matter under its comprehensive control, the tribes, like the states, cannot interfere with the federal plan by imposing the burdens of taxation.[5] Regardless of the legality

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[4] Apparently the only federal regulation dealing with sales of tobacco on Indian lands is 25 CFR §251.17, which prohibits licensed traders from selling tobacco, cigars or cigarettes to Indians under 18 years of age.

[5] At least two lower federal courts have concluded that the Indian Mineral Leasing Act preempts state regulation of restricted Indian lands. **See Samedan Oil Corp. v. Cotton Petrol-**

of tribal taxation in other areas, the tribes cannot tax commerce regulated in its entirety by the United States.

This has been the consistent position of the Executive Branch since 1824. In that year, the United States Attorney General rendered the opinion that the Cherokee Nation had no right to impose a tax on federally licensed traders. 1 *Op. Att'y Gen.* 645, 652 (1824). The grounds upon which the Attorney General based his opinion, moreover, bear a distinct similarity to this Court's preemption rationale in *Warren Trading Post, supra.* After comparing the exclusive right of Congress to regulate commerce among the states with the exclusive right of Congress to regulate Indian commerce, the Attorney General stated:

> "The question is whether a right on the part of the Cherokee nation to tax the traders thus licensed on the part of the United States be compatible with that sole and exclusive right to regulate the trade from which the authority of the license proceeds? The imposition of the tax on the traders is the imposition of a new condition, on which alone the Cherokees say that this trade shall be carried

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[5] **Continued**

eum Corp., 466 F.Supp. 521 (W.D.Olka 1978) (holding that the Secretary's regulations preempted the application of Oklahoma's unitization orders on tribal lands, in the absence of Secretarial approval of the orders); Assiniboine & Sioux Tribes v. Calvert Exploration Co., 223 F.Supp. 909 (D. Mont 1963), rev'd on other grounds sub nom, Yoder v. Assiniboine & Sioux Tribes, 339 F.2d 360 (9th Cir. 1964) (holding that state-ordered pooling of Indians oil and gas lands was preempted by federal regulation). Likewise the Solicitor of the Interior Department has twice concluded that the Indian Mineral Leasing Act preempts state taxation of non-Indian mineral production on tribal lands. 84 I.D. 905 (1977); 86 I.D. 181 (1979). See also, B. T. Dolan, "State Jurisdiction Over Non-Indian Mineral Activities on Indian Reservations," 21 Rocky Mtn. Min. L. Inst. 475, 527 (1975).

> on. It is a new regulation of the trade instituted by them, while the sole and exclusive power to regulate it is acknowledged by the treaties to be in the Congress of the United States. Is this sole and exclusive power in Congress consistent with the existence of a like power in a separate and independent sovereign, directed by a different judgment and a different will? I apprehend not."

In 1934, the Assistant Secretary of the Interior Department rendered the following opinion on the same subject:

> "In view of the fact . . . that Congress has conferred upon the Commissioner of Indian Affairs exclusive jurisdiction to appoint traders on Indian reservations and to prescribe the terms and conditions governing their admission and operations (see secs. 261 and 262, title 25, U.S. Code), an Indian tribe is without power to levy a tax upon such licensed traders unless authorized by the Commissioner of Indian Affairs to do so."

Powers of Indian Tribes, 55 I.D. 14, 48 (1934). Fourteen years later the Solicitor of the Interior Department rendered an opinion on federal approval of tribal regulations. Again, the subject of the opinion was licensed trading, to which the Navajo tribal government attempted to attach conditions:

> "It follows . . . that the several conditions set forth in the [Navajo] resolution of March 20, 1948, in so far as they affect the business of licensed traders, cannot be made effective unless they are adopted by the Commissioner as part of the regulations prescribed by him in the exercise of his exclusive authority in this field, or unless they are incorporated, with the approval of the

> Secretary or his authorized representative, in permits covering the use by traders of lands belonging to the tribe. Standing alone, such conditions cannot be enforced either against new licensees or against those whose licenses have not been expired."

Regulation of Traders on the Navajo Reservation, 60 I.D. 176, 180 (1948). Based upon these authorities, the Department of Interior's *Handbook of Federal Indian Law* concludes:

> "Since . . . the exclusive power to trade with the Indians is vested in the Commissioner of Indian Affairs, it would seem that, in the absence of specific authorization, the tribe has no power to tax licensed traders."

Interior Department, Handbook of Federal Indian Law 886 (1958 official ed.) (footnotes omitted).

The federal government's regulation of licensed trading (now codified in part 251 of Title 25 of the Code of Federal Regulations) is no more pervasive or complete than its regulation of the leasing and production of oil, gas and other minerals from restricted Indian lands. Indeed, a comparison of the mineral leasing and production regulations (reviewed in Part IA of this brief) with the BIA's trading regulations demonstrates that the Secretary of Interior has regulated the former in far greater detail. Moreover, the overall economic and environmental consequences of mineral development regulation are exponentially greater than those of trading regulation. Unregulated and disparate development of the vast reserves underlying the reservations will pose

grave risks to the tribes, who benefit from the revenues of production, to the producers, who have invested millions of dollars in tribal leases, and to the public, which may ultimately pay for excessive financial burdens on production.

The federal interest entailed in uniform regulation of mineral development from tribal lands therefore mandates close scrutiny of any tribal taxing scheme that burdens development. As in *Warren Trading Post, White Mountain Apache,* and the Attorney General and Interior Department opinions quoted *supra,* there is no room in the federal regulatory scheme for the additional burdens of taxation imposed by a subordinate sovereign. A "particularized inquiry" into the nature of federal and tribal interests at stake reveals that the exercise of tribal taxing authority would violate federal law. *See White Mountain Apache Tribe v. Bracker, supra,* 100 S.Ct. at 2584.

3. *Federal versus tribal interests*

Tribal taxation would undermine the express purpose of the Indian Mineral Leasing Act "to obtain uniformity so far as practicable of the law relating to the leasing of tribal lands for mining purposes." H. R. Rep. 1872, 75th Cong., 3d Sess. (March 3, 1938). If each tribe is left at large to tax any aspect of the business or property of producers, the effective burden upon producers will vary drastically from reservation to reservation, despite the existence of uniform federal regulation. The Secretary of the Interior's prescription of uniform terms of compensation in tribal leases and his ex-

clusive power to fix higher rates of royalty (*see* 25 CFR §171.13), are meaningless if the tribes are free to exact at will additional royalties in the form of taxes.

But an even more fundamental purpose of federal regulation under the Indian Mineral Leasing Act must be that of continuing the orderly development of tribal resources. Tribal taxation of such development, if it is unrestrained by federal authority, may well mean the end of oil, gas and mineral production on tribal lands. The power of tribes to tax producers is the power to drive producers from the reservations. This was precisely the point of the Attorney General of the United States when he opined that the Cherokee Nation lacked the power to tax licensed traders:

> "Again: if the Cherokee nation have the right to tax at all, the quantum of the tax rests in their own discretion. If they have a right to impose a tax of $50, they have the same right to impose a tax of $500, $5,000, or $50,000 . . . The treaties having given to Congress the right to create these regulations of trade, a power to destroy them is a wholly incompatible power; and a power to tax, as the Supreme Court has said, is, virtually, a power to destroy."

1 *Op. Att'y Gen., supra,* at 650.

4. *Federal delegation of regulatory authority*

Finally we address two comments to that portion of the decision of the Court of Appeals in these cases that would permit tribes organized under the Indian Reorganization Act to regulate—and therefore to tax—oil and gas production on restricted Indians lands. *See*

Merrion v. Jicarilla Apache Tribe, 617 F.2d 537, 548-49 (10th Cir. 1979).

First, Section 4 of the Indian Mineral Leasing Act charges Congress with the duty to regulate every aspect of all operations under any oil and gas lease issued pursuant to any act affecting restricted Indian lands. 25 U.S.C. §396d. Section 4 does not authorize the Secretary to delegate any portion of that responsibility to the tribes. The proviso in section 2 of the Act, which deals exclusively with the acquisition of leases, permits tribes organized under the Indian Reorganization Act "to lease lands for mining purposes," subject to the approval of the Secretary. If Congress had intended to permit the tribes to regulate operations under the leases, it would have inserted a proviso in Section 4 similar to the proviso in Section 2. Thus the structure of the Act makes it clear that organized tribes may undertake to lease their lands but that the responsibility for regulating operations under those leases remains with the Secretary. If Congress had intended to permit the tribes to exercise an open-ended power of taxation, it would have cast the Act in different terms. The limited power to lease, which is reserved to organized tribes, cannot rationally be interpreted as the power to ignore the terms of leases approved by the Secretary and to place the burden of taxation upon the lessees' entire operations.

Second, even if the powers of organized tribes to "lease lands for mining purposes" include the power to tax lessees, tribal power must be limited by the same due process considerations built into the Secretary's reg-

ulations. The Secretary's regulations provide that "no regulations made after the approval of any lease shall operate to affect the term of the lease, rate of royalty, rental, or acreage unless agreed to by both parties to the lease." 25 CFR §171.28. Implicit in this regulation is the recognition that the congressionally mandated leasing system is to be just that: a cooperative undertaking by the tribe, the private lessee and the United States, each to play its own role according to the covenants set forth in the leases. None of these parties — not even the federal administrator — may alter the basic terms of the arrangement once the lease has been appoved. If this were not the case, the development of Indian lands would not be accomplished by Congress's leasing system, but by the unfettered will of one or the other of the parties. If tribal regulations may in some sense supersede the Secretary's regulations, the tribes are nevertheless bound to observe the *consensual* nature of Congress's plan. In short, if the Secretary of the Interior cannot unilaterally change the basic terms of the lease after it is approved, neither can the tribe. Yet that is precisely the effect of the tribal taxing scheme now before the Court.

II. *TRIBAL TAXES IMPOSE AN UNLAWFUL BURDEN ON INTERSTATE COMMERCE*

The Constitution commits the power to regulate the free flow of interstate commerce to Congress exclusively. That power is forbidden to the states because "in the matter of interstate commerce we are a single nation —

one and the same people." *Pennsylvania v. West Virginia*, 262 U.S. 553, 596 (1923). This Court has never addressed the extent to which Indian tribes may tax interstate commerce originating on tribal lands. These amici, who are potentially subject to both tribal and state taxes, believe that tribal taxation provides a direct commercial advantage to the tribe and its members while imposing upon interstate commerce an unlawful multiple tax burden. Accordingly, the discussion that follows first examines the infirmities of tribal taxes standing alone, and then examines the problems arising from concurrent tibal and state taxation of the same activity or property.

A. *Tribal Taxes Unlawfully Provide A Direct Commercial Advantage to The Tribe and Its Members*

The strong national interest in insuring freedom of trade among the states and in avoiding economic Balkanization has been the basis of a series of recent decisions invalidating state legislation under the Commerce Clause. *See, e.g., Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366 (1976); *Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Hughes v. Oklahoma*, 441 U.S. 322 (1979). "[W]here simple economic protectionism is affected by state legislation, a virtually per se rule of invalidity has been erected." *Philadelphia v. New Jersey, supra*, 437 U.S. at 624. Parochial legislation discriminating against articles of commerce entering or leaving the state is unconstitutional. *Philadelphia v. New Jersey, supra, Hughes v. Oklahoma, supra.*

States may not advance local interests "by the illegitimate means of isolating the State from the national economy." *Philadelphia v. New Jersey, supra,* 437 U.S. at 627. The Court has carefully scrutinized such protective state taxes because it is a "fundamental principle" that "no State may, consistent with the Commerce Clause, 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.'" *Boston Stock Exchange v. State Tax Commission,* 429 U.S. 318, 329 (1977).

Thus the states may not isolate themselves from the national economy in order to preserve local resources or to exact tribute from interstate customers for scarce goods. The basic question here is whether the Indian tribes may do so with respect to resources on reservations. This issue is of great significance to the tribes themselves. Thus, for example, the Navajo Tribal Council's "Energy Policy" resolves: "All energy resources of the Navajo Nation belong to the Navajo Nation. Navajo energy resources shall be developed to meet the present and future needs and for the full use and benefit of the Navajo people." Navajo Tribal Council Resolution CAP 34-80 (April 29, 1980). The Commerce Clause must be construed to impose upon the tribes limitations similar to those imposed on the states. Any other result would be "inconsistent with the overriding interests of the National Government," *Washington v. Confederated Tribes of Colville Indian Reservation, supra,* 100 S.Ct. at 2081, and with the basic constitutional command that the United States be maintained as an open and free market.

The Court of Appeals in the case at bar correctly concluded that the standard to be used in applying the Commerce Clause to Indian tribes "is whether a tribe's tax legislation infringes upon the national interest in maintaining the free flow of interstate trade." *Merrion v. Jicarilla Apache Tribe, supra,* 617 F.2d at 545. However, the court erred in its conclusion that the Jicarilla tax did not discriminate against interstate commerce. Although the tribe's ordinance purports to be non-discriminatory, the tax is to be paid only with respect to oil and gas "sold or transported off the reservation." Oil and gas delivered to the tribe is specifically exempted. On its face the tax discriminates because it is imposed only on oil and gas transported from the reservation.

The Court of Appeals likened the tax in this case to the state severance taxes upheld in such cases as *Oliver Iron Mining Co. v. Lord,* 262 U.S. 1972 (1923), and *Alaska v. Arctic Maid,* 366 U.S. 199 (1961). Those cases, however, were significantly different. In the first place, the taxes involved in those cases made no overt discrimination of the kind involved here. The taxes in those cases were paid with respect to resources consumed within the state, as well as without. In the second place, the danger of discrimination against commerce in favor of local interests is far stronger where the tax is imposed by a tribe which is both the governing body and also the proprietor of the lands from which the taxed resources are taken.

When a state imposes a severance tax, the basic requirement that the tax apply to all production and not

just to that moving in interstate commerce substantially protects the national interest in freedom of trade. The local political process can be relied upon to prevent the imposition of taxes so high as to preserve resources exclusively for local use or unfairly to burden the interstate market. For a variety of local interests are adversely affected by such a tax. Producers find their competitive position in the interstate market impaired. Local costs of energy refined or processed in interstate commerce increase for both industrial and residential consumers. Those adversely affected in these ways may participate in the political processes through which taxing decisions are made.

On an Indian reservation, however, the political process cannot be relied upon to protect the national interest. Non-members of the tribe, though resident and doing business on the reservation, are barred from participation in tribal politics. Tribal members who can participate do not have private economic interests in the production of oil and gas nor will their energy costs be affected by the imposition of a tribal severance tax. A tribal severance tax naturally increases the resources available for tribal members without placing any direct or indirect burden on those members. The only restraints likely to be felt by tribal governments in determining the level at which to set the tax are economic—what the traffic will bear. In fact, a tribe seeking to repudiate its oil and gas leases and take over the property and production rights of the lessees may accomplish that end by imposing taxes so high as to make operation so unprofitable that lessees will abandon their leases.

In short, where tribal lands are held in common and where tribal members, who alone can vote, benefit from increased tribal revenues derived from the tax on oil and gas transported from the reservation, no effective political constraint on the taxing process exists. The Jicarilla Apache tax has the same economic effect as a state tax imposed exclusively on goods produced locally and shipped in interstate commerce: local government receives increased revenues and consumers outside the government's jurisdiction pay the price. Just as such a state tax would be held violative of the Commerce Clause, so must the tribal tax involved here.

In *Reeves, Inc. v. Stake*, 100 S. Ct. 2271, 2277 (1980), this Court held that the Commerce Clause does not prohibit a state, in the absence of congressional action, from "participating in the market and exercising the right to favor its own citizens over others." Neither *Reeves* nor other cases like it, however, supports tribal taxation of businesses to which the tribe has leased its mineral lands. The Jicarilla Apache Tribe does not purport to exercise its proprietary interests in imposing the severance tax at issue here. The tribe does not itself sever or market oil and gas in the way that the state produced and marketed cement in *Reeves*. Instead the tribe exercises a claimed *governmental* power to tax private persons engaged in business within the reservation. The tribe exercised its proprietary power when it entered into oil and gas leases with petitioners, and the tribe is compensated for its property interests by petitioners' payment of bonuses and the royalty prescribed in the leases. This distinction between proprietary and

governmental basis for taxation is more than academic. If the Jicarilla Apache tax is to be regarded simply as a condition imposed upon those purchasing natural resources from the tribe, then it cannot apply to the parties in this case since that condition was not part of the agreement made when the leases were executed.

The fact that Congress has power to intervene and protect interstate commerce against burdensome tribal taxes should not be a reason for upholding the tax. It has long been settled that the power of Congress to intervene is not a reason for the Court to abandon the process of making "the delicate adjustment between the national interest in free and open trade and the legitimate interest of the individual states in exercising their taxing powers" *Boston Stock Exchange v. State Tax Commission, supra,* 429 U.S. at 329. Similarly, the power of Congress should not be a reason for avoiding the making of that "delicate adjustment" when tribal taxes are involved. The national interests in freedom of trade and in preventing tribal governments from isolating reservations from the national economy justify the Court's intervention now.

B. *Concurrent Imposition of State and Tribal Taxes Violates the Commerce Clause*

The Court of Appeals in the instant case, we insist, was clearly wrong when it stated: "That New Mexico may be able to impose an identical tax on lessees does not implicate the federal interest in maintaining the flow of interstate commerce. . . ." 617 F.2d at 546. Petitioners have demonstrated that New Mexico imposes a

severance tax on the same oil and gas production which the Jicarilla Apache seeks to tax. Concurrent state and tribal taxes on interstate transactions create the same barriers to interstate trade created by multiplication of state taxes. It was "the object of the Commerce Clause" to remove such barriers. *Western Livestock v. Bureau of Revenue*, 303 U.S. 250, 256 (1938).

Because tribal taxation of the kind at issue in this case is a recent development, the courts have not considered the multiple tax question raised by petitioners. However, *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979), presents a useful analogy. The question there was whether Los Angeles County could impose its property tax on cargo containers present in the county on tax day but owned by Japanese shipping companies and used in foreign commerce. Even though the tax was fairly apportioned to values in California, the Court held the tax invalid because Japan had imposed its property tax on the same containers. The Court said: "It is a commonplace of constitutional jurisprudence that multiple taxation may well be offensive to the Commerce Clause." 441 U.S. at 446. A principal reason given for the *Japan Line* decision was that the Court was powerless to prevent multiple taxation by compelling Japan to apportion its tax.

The problem here is basically similar. Oil and gas produced on the reservation and sold off the reservation in interstate commerce must bear the burden of two severance taxes, while oil and gas produced elsewhere is subject to a single severance tax. As in *Japan Line*,

conventional Commerce Clause analysis does not readily serve to protect this commerce against multiple burdens. Where states alone are involved, only the state in which production occurs may impose a severance tax, a circumstance that prevents the multiplication of such taxes as a burden on interstate commerce. But if Indian tribal governments are held to have the power to impose severance taxes, two independent taxing jurisdictions within the geographical boundaries of a single state may tax production of the same oil and gas.

Moreover, *Washington v. Confederated Tribes of Colville Indian Reservation, supra,* does not validate dual tribal and state taxation of the kind involved here. In *Colville,* both the tribe and the state imposed excise taxes on local sales of cigarettes. Because the cigarettes were purchased by the buyer on the reservation and delivery was taken there, the Court in *Colville* had no occasion to consider the effects of dual taxation on interstate commerce. Commerce with the Indian tribes was affected only insofar as dual taxation would cause fewer persons to enter the reservation to purchase cigarettes. In this respect, the Court emphasized that the local demand for cigarettes arose only because the tribes sought to market a claimed tribal exemption from state taxes to non-Indians residing outside the reservation. It was not shown that the duplication of taxes would significantly affect that commerce upon the reservation which would exist but for the supposed state tax exemption.

The instant case presents dramatically different facts. Most of the oil and gas that petitioners produce

from the Jicarilla Apache Reservation is sold in interstate commerce and is sold, moreover, with no state tax exemption. Indeed New Mexico, like other states, has taxed hydrocarbon production from Indian reservations for many years. The addition of tribal taxes imposes an unconstitutional burden on the commerce in which petitioners, and others like them, are engaged.

CONCLUSION

For the foregoing reasons, these amici respectfully urge the Court to reverse the judgment of the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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